In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-824

ROBERT S. PERSKY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-913

PHILIP ZANE AND JEROME E. SILVERMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were improperly denied a new trial on the basis of newly discovered evidence.

After a five-week jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of filing a false Form 10K Annual Report with the Securities and Exchange Commission, in violation of 15 U.S.C. 78*o* and 78ff. Each petitioner was sentenced to two years' imprisonment, with four months to be served in a penal institution and

with execution of the remainder of the sentence suspended, subject to probation for a period of two years following release from custody. The court of appeals affirmed in a thorough opinion. 495 F.2d 683. This Court denied certiorari on October 21, 1974 (Nos. 73-1878 and 73-1901). Petitioners then filed motions for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The motions were denied by the district court, and the court of appeals affirmed in an opinion on which we principally rely (Persky Pet. App. 1a-8a; 507 F.2d 346).

1. Petitioners based their motions for a new trial on what they allege to be newly discovered evidence relating to the credibility of Akiyoshi Yamada, one of the witnesses on behalf of the government at their trial. Yamada had been indicted with petitioners but pleaded guilty to a single count in that indictment and in two other indictments and testified against them. The other counts against him were dismissed. The factual predicate of petitioners' claim for a new trial was described by the court of appeals as follows (Persky Pet. App. 2a-3a):

> [Yamada] gave extensive testimony implicating Zane, Silverman and Persky not only on the charge of which they were found guilty but on various other counts on which they were acquitted. Less than four weeks after the conviction of Zane, Silverman and Persky, Yamada came before Judge Cooper on a motion to reduce the sentence imposed on him for the crime to which he had pleaded guilty. In support of this motion five letters purportedly written by persons active in community affairs were submitted by Yamada to Judge Cooper. These letters, which testified to Yamada's good character and praised his work with drug addicts, were written by Yamada himself to influence Judge Cooper.

> Claiming that proof that Yamada had forged these letters and that he had engaged in such fraudulent and criminal conduct constituted newly discovered evidence, Zane, Silverman and Persky made a motion for a new trial, pursuant to Rule 33, Fed. R. Crim. P. Judge Wyatt denied the motion from the bench remarking that Yamada's credibility had been fully explored at the trial, that the sending of the letters was merely cumulative evidence by way of impeachment and that such proof had no relevance to the issue of the filing of the false report with the SEC. He also found there was no probability that on a new trial with the benefit of the evidence concerning the fraudulent letters a new jury would reach a different conclusion with respect to the guilt of these appellants.

After analyzing the facts in light of the standards for ruling on motions pursuant to Rule 33,[1] the court of appeals correctly concluded (Persky Pet. App. 4a-5a):

> It is obvious that the evidence of the forgery and sending of the letters was cumulative on the issue of credibility and that it had no bearing on the issue of whether or not appellants were guilty of filing the false report with the SEC. Yamada had a lengthy history of involvement in fraudulent securities schemes. Prior to the trial of the appellants, Yamada pleaded guilty to three one-count indictments, one

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[1] In exercising its discretion, the district court must determine whether with due diligence the evidence could have been discovered prior to or during trial, whether the evidence is material to the issues at trial and not merely cumulative and impeaching and whether the evidence would probably produce a different result at trial. *United States* v. *Birrell*, 482 F.2d 890, 892 (C.A. 2); *United States* v. *DeSapio*, 456 F.2d 644, 647 (C.A. 2); certiorari denied, 406 U.S. 933; *United States* v. *Polisi*, 416 F.2d 573, 576-577 (C.A. 2).

of which concerned the conspiracy to file a false annual report for Microthermal. In return for cooperation with the government in the prosecution of the appellants, it was understood that the government would not proceed on other criminal offenses committed by Yamada, and also that the government would advise the court of his co-operation at the time of sentencing. At the trial, Yamada was subjeted to thorough cross-examination. The basis of Yamada's cooperation, the criminal charges, and his numerous fraudulent securities schemes were brought out to impeach his credibility. In addition, Yamada testified to destroying documents and giving perjurious testimony before the SEC in the course of its investigation into Microthermal.

In support of his finding that the evidence of the forged letters would probably not result in any different decision by the jury on a new trial, Judge Wyatt referred to his recollection of the proofs and his instructions to the jury. We find no reason to disturb a finding based upon such reasoning. We are not persuaded that a new jury would decide the case differently if it knew that Yamada's claim at the first trial that he had reformed and turned over a new leaf was false. Indeed, at the time of the first trial he may have thought he had reformed.[2]

Petitioners rely on this Court's decision in *Mesarosh* v. *United States,* 352 U.S. 1, in support of their contention that they are entitled to a new trial. This

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[2]See also the oral opinion of the trial judge reproduced at Persky Pet. App. 6a-8a.

reliance is misplaced. In *Mesarosh*, the credibility of a government witness in a series of internal security cases became an issue when the Solicitor General informed this Court that the government had reason to doubt his truthfulness based on the testimony he had given at other trials. Exercising its supervisory role over the federal courts, this Court overturned Mesarosh's conviction, since the witness's credibility "has been totally discredited by the disclosures of the Solicitor General." 352 U.S. at 9. Unlike the situation in *Mesarosh*, Yamada's credibility was always at issue in this case and his role and interests were clearly before the jury, which is the ultimate judge of the evidence. Yamada was subjected to extensive cross-examination which revealed his past involvement in fraudulent securities schemes and the criminal charges against him in this case. The fact that he later sought to perpetrate a fraud on the court in connection with his sentence did not add measurably to the understanding of his basic character and credibility, which had been exhaustively examined at trial.

Petitioners argue that the decision of the court of appeals in this case conflicts with the decision of the Ninth Circuit in *United States* v. *Chisum*, 436 F.2d 645. In that case, involving sales of narcotics, the conviction was found to have been based entirely on the testimony of the purchaser, a federal narcotics agent who later pleaded guilty to giving false testimony in a similar narcotics case (*id.* at 647-648). The decision of the court of appeals to grant a new trial in that case does not conflict with the decision below, since here, as the district court pointed out (Persky Pet. App. 7a), Yamada was not the only witness for the prosecution. Moreover, Yamada was not a government agent, nor was he convicted of giving false testimony as a witness against other offenders.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.